

BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

RICHARD G. CASE,	)	
	)	
Appellant,	)	PCHB No. 89-114
	)	
v.	)	
	)	FINAL FINDINGS OF FACT,
STATE OF WASHINGTON, DEPARTMENT	)	CONCLUSIONS OF LAW
OF ECOLOGY,	)	AND ORDER
	)	
Respondent.	)	

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Richard G. Case has appealed the State of Washington Department of Ecology ("DOE") Order (No. DE 89-C353), cancelling Ground Water Permit No. G4-26306P. The proposed withdrawals are to irrigate land in Klickitat County, Washington.

After motions practice, the Pollution Control Hearings Board ("Board") issued an Order Denying Stay on January 2, 1990.

A hearing on the merits was held in Yakima, Washington on April 30, 1990. Present for the Board were Chair Judith Bendor, presiding; and Member Wick Dufford. Appellant Case represented himself.

1 Assistant Attorney General P. Thomas McDonald represented respondent  
2 DOE. Court reporter Linda S. Stevens with Jackie Adkins and  
3 Associates (Yakima) recorded the proceedings.

4 Sworn testimony was heard. Exhibits were admitted. Argument was  
5 made. Having considered these, the Board has deliberated and makes  
6 these:

7 FINDINGS OF FACT

8 I

9 On April 29, 1980, DOE issued to Richard G. Case a permit  
10 (G4-26306, "permit 26") to appropriate groundwater to irrigate 1100  
11 acres of land in Klickitat County. The permit had a priority date of  
12 July 31, 1979.

13 The permit provided for irrigation from March 1 through October  
14 31, at the rate of 2400 gallons per minute ("gpm"), limited on an  
15 annual quantity of 2590 acre-feet. This is the permit subject to the  
16 Order of Cancellation at issue in this appeal

17 II

18 Case leases a total of 1760 acres of land, 1396 acres from Marion  
19 Z. Case, 240 acres from the Department of Natural Resources, and 80  
20 acres from a private party. The leases are through the year 2,000.

21 II

22 Permit 26 required the project to be completed by April 1, 1982  
23 and the water put to full beneficial use by April 1, 1983.

1 Case did not complete the project in 1982. Case filed five  
2 separate permit application extension requests (1983, 1984, 1985,  
3 1986, 1988). DOE granted each of these.

4 On June 26, 1989, Case filed a sixth extension request. From  
5 this request DOE learned that the work had not been completed by the  
6 April 1, 1989 deadline. The Department denied the extension request  
7 and issued Order of Cancellation DE 89-C353. Case appealed this order  
8 to the Board, which became our PCHB 89-114.

9 III

10 Richard Case has a separate and distinct water permit for a well  
11 ("Well 1") on the same property (G4-25574P, "permit 25"; 424 acre-feet  
12 annually, 1280 gpm). This permit is for the irrigation of land (127  
13 acres; 422 acre-feet) and for domestic use (2 acre-feet). This permit  
14 is not being contested by DOE in this proceeding.

15 Case was going to use Well 1 for both permits, and also drill a  
16 second well so as to fully utilize the total water volumes allowed by  
17 both permits.

18 IV

19 In 1979 Well 1 was drilled under Permit 25 to a depth of 585  
20 feet, 10 inch diameter, with casing to the 19 foot level. It was  
21 subsequently reamed to a 12" diameter and a 200 horse power pump  
22 installed. The well was pumped for 60 days and then filled with  
23 sand. The production tapered off to a level unusable under Case's  
24

1 irrigation program.

2 In 1981 a television-video camera was sent down the well. Static  
3 water was found at 236 feet. At about 400 feet, the well left the  
4 basalt formation, went into sandstone and a large void was observed,  
5 where the well had collapsed. The bottom of the well was encountered  
6 at 411 feet.

7 V

8 Also in 1981, Well 2 was drilled. After drilling to 425 feet the  
9 same problem with sand as in Well I was experienced and the effort was  
10 terminated. This well has never been used.

11 VI

12 In order to protect neighboring wells, Permit 26 required Well I  
13 to be cased "into the first consolidated basalt zone below 580 feet."  
14 In 1982 Case had the well cased to the 635 foot level.

15 In 1983 Case had the well drilled to 1,048 feet, with the casing  
16 extended to the 665 foot level. The goal was to reach the aquifer in  
17 the Priest Rapids formation. The well, however, did not produce  
18 water. Case thought the water bearing zones had been sealed off by  
19 the casing, but was unable to persuade the well driller to pull the  
20 casing back to the sandstone strata.

21 Case obtained the services of a different well driller who in  
22 April 1985 perforated the casing at the 625 to 655 feet depths.  
23 According to the well driller's report, the well was tested and  
24 produced 610 gpm, with a 141 foot drawdown after 24 hours. After the  
25

1 well drilling rig was removed, however, the well stopped producing.  
2 Fine sands had apparently worked their way down and clogged the well.

3 VII

4 On June 1, 1985, Case applied for another one year extension,  
5 stating in part that "Well No. 1 was re-worked and is now producing  
6 610 gpm." DOE granted the extension.

7 On May 5, 1986 Case filed another extension request, stating that  
8 in April 1985 the well's casing was perforated from 625 feet to 655  
9 feet. "This improved the production of the well considerably, but  
10 still not up to the amount indicated on the permit." Case noted that  
11 there was a court suit pending against the original well driller. He  
12 stated that the only way to increase the production was with a screen  
13 and gravel pack, "which will be done as soon as possible".<sup>1/</sup>

14 DOE granted this extension, stating: "OK for final extension of  
15 CC from 4-1-86 to 4-1-87." "CC" apparently referred to completion of  
16 construction.

17 VIII

18 In May 1988 Case's extension request stated that "the system is  
19 completed except for well repairs which will be completed in the near  
20 future.

21  
22 <sup>1/</sup> The well logs indicate that the first consolidated basalt zone  
23 below 580 feet begins at about 670 feet. There is thus a question as  
24 to whether the perforations are consistent with the casing  
25 requirements of the permit.

1 DOE granted the extension, mailing Case's request back to him  
2 with the notation: "final ok for extension of PA from 4-1-88 to  
3 4-1-89". "PA" referred to proof of appropriation, reflecting an  
4 assumption that no more time was being sought for completion of  
5 construction.

6 Case's 1989 extension request (dated June 26, 1989), stated in  
7 part: "well collapsed; not being used-see letter from DNR." The DNR  
8 letter merely outlined three ways to handle the problems that had  
9 first manifested in 1985.

10 DOE denied the extension request and issued the Order of  
11 Cancellation.

12 IX

13 The evidence presented at the hearing made clear, in hindsight,  
14 that Case's requests for continuance starting in 1985 were at a  
15 minimum inaccurate and incomplete.

16 X

17 During the hearing Case testified on his ideas about completing  
18 the project so as to appropriate the water under permit 26. In order  
19 to use permit 26, an entirely new well would likely have to be drilled  
20 and cased, which is expensive. Case has not secured any financing for  
21 this work. Mr. Case contends that it is difficult to obtain financing  
22 where the land leases are only 10 years long.

1 No work had been done on Well 1 since 1985. No water has been  
2 drawn from the well since 1981. No work has been done on the second  
3 well since 1981.

4 X

5 Any Conclusion of Law which is deemed a Finding of Fact is hereby  
6 adopted as such.

7 From these Findings of Fact, the Board reaches the following:

8 CONCLUSIONS OF LAW

9 I

10 The Board has jurisdiction over these parties and this subject.  
11 Chapters 43.21B, 90.44 and 90.03 RCW.

12 II

13 The Department of Ecology has extensive responsibilities,  
14 outlined in statute, to determine if waters of the state are  
15 available, can be put to beneficial use without impairing existing  
16 rights, and serve the public interest. RCW 90.03.290. Stempel v.  
17 Department of Water Resources, 82 Wn.2d 109, 667 P.2d 64 (1983).

18 As we stated in the January 2, 1990 Order Denying Stay:

19 The purpose of regulating water appropriation in  
20 Washington is to protect the public welfare. The use  
21 of water in the State of Washington is defined by the  
22 state constitution to be a public use. Wash. Const.  
Art. 21, §. In the surface water code, the following  
purpose is stated:

23 to promote the use of the public waters in a  
24 fashion which provides for obtaining maximum net  
25 benefits arising from both diversionary uses of  
the state's public waters and retention of waters  
within streams and lakes in sufficient quantity

26 FINAL FINDINGS OF FACT,  
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and quality to protect instream and natural values and rights.

RCW 90.03.005. The ground water code is explicitly an extension of the surface water statute to the appropriation of ground water. RCW 90.44.020. The permit system of water allocation allows the State to efficiently implement the state water policy. See, DOE v. Abbott, 103 Wn.2d 686, 694 P.2d 1071, (1985).

## III

RCW 90.03.320 requires that actual construction work shall begin within a reasonable period, be prosecuted with diligence, and completed within the time prescribed by DOE. The time allowed is to be reasonable and just under the conditions then existing, "having due regard for the public welfare and public interests affected [...]."

RCW 90.03.320. The Department has the authority to grant extensions for further period(s) as are reasonable, "having due regard to the good faith of the applicant and the public interests affected". RCW 90.03.320. That section further goes on to state that if the terms of the permit or extension are not complied with, the Department shall give notice by registered mail that the permit will be canceled unless the holder shows cause within 60 days why the permit should not be canceled. Id.

## IV

In exercising its regulatory responsibility, DOE issued a water permit to Richard Case requiring him to complete the project within two years, and put the water to beneficial use one year later. Case



1 did not appeal the permit or its conditions, so the conditions'  
2 reasonableness are not at issue.

3         Nonetheless, we note the wisdom of these conditions, promoting  
4 Washington water laws' basic principle: "first in time, first in  
5 right", and as critically promoting the orderly allocation of water.  
6 When allocating, DOE deducts the amount of water appropriated in  
7 outstanding permits, including the amounts in permits where the  
8 projects have not yet been completed or the water not put to full  
9 beneficial use. Only if there is sufficient public water remaining,  
10 are new permits issued. In essence, those granted a permit to  
11 appropriate, who have not begun construction, or not completed it, or  
12 not put the water to beneficial use, have the potential to block  
13 subsequent permit applicants from obtaining water. Clearly, if the  
14 public interest is to be served, time requirements are essential.

15                                 v

16         We conclude that the Department has been eminently fair to Mr.  
17 Case, granting him numerous extensions, affording him an extra six  
18 years to complete the construction. Despite this, no work whatsoever  
19 has been done for the past four years. Since at least 1985, appellant  
20 has not demonstrated diligence in his efforts to complete the project.

21         The public benefit is not served if this situation were to  
22 continue when others with need might be waiting.

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VI

The only issue remaining is the legal effect of the Department's failure to provide 60 days notice of its intent to cancel under RCW 90.03.320. We conclude that the lack of this formal notice should not operate to invalidate the cancellation.

Under the facts, Case cannot and has not maintained that the cancellation came as a surprise, or that he has had no opportunity to present a case on the matter before it came final. The 1988 extension provided notice that it was the last one to be granted, in substantial compliance with the requirements of the statute. See, Adsit v. DOE, 103 Wn.2d 698, 649 P.2d 1065 (1985).

Most critically, the PCHB de novo hearing afforded ample procedural due process to appellant, thereby vitiating any harm that DOE's failure to send formal notice might have caused in the context of this particular case, since Mr. Case was not expending additional funds at the time of cancellation or using the water.<sup>2/</sup>

VII

We conclude that the Order of Cancellation should be affirmed. After reaching this result, we observe that Mr. Case still has permit 25. Moreover, there is nothing that prevents him from re-applying for another permit to establish his place in line.

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<sup>2/</sup> While the failure to provide the 60 day notice is not fatal under the facts here, Ecology ought to review its procedure on this point.

VIII

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law, the Board reaches the following:

ORDER

Order of Cancellation DE 89-C353 is AFFIRMED.

DONE this 18th day of June 1990.

POLLUTION CONTROL HEARINGS BOARD

Judith A. Bendor by Jm  
JUDITH A. BENDOR, Presiding

Wick Dufford  
WICK DUFFORD, Member

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